Discussion of Findings Required by Government Code section 12894

January 2013

This discussion document has been reviewed by the staff of the California Air Resources Board and approved for publication. Approval does not signify that the contents necessarily reflect the views and policies of the Air Resources Board. This discussion includes a brief background, a summary of Québec's Cap-and-Trade program, and a comparison of that program with California's program organized around four findings required by statute as a precondition to linking the two programs.

Background

After the Air Resources Board (ARB) published its May 9, 2012, Initial Statement of Reasons for regulatory amendments to link California's Cap- and-Trade program with a similar program in Québec, the Legislature enacted SB 1018 (chaptered on June 27, 2012). That bill included provisions intended to ensure that any decision to link market-based compliance programs under AB 32 with a program in another jurisdiction would occur only after consideration and adoption of four findings. Those provisions were codified in section 12894 of the Government Code. Under the new law, prior to formally linking the Cap-and-Trade regulation, ARB must notify the Governor, who then has 45 days in which to consider advice from the Attorney General, and make (or decline to make) four specified findings which are to be submitted to the Legislature. (Gov. Code §12894, subds. (f) and (g).)

In light of the legislation, on June 28, 2012, the Board directed the Executive Officer to formally request that the Governor make the required findings regarding Québec's Cap-and-Trade regulations and provide those findings to the Legislature. This discussion provides background and support for the Air Resources Board's plan to request that the Governor make certain findings as a predicate to linking the Cap-and-Trade programs developed in parallel by California and Québec. The final Québec regulations are also being placed into the administrative record.

The Global Warming Solutions Act of 2006 (AB 32) directed ARB to develop a strategy and a suite of regulations to address climate change by limiting greenhouse gas emissions in 2020 to 1990 levels. Several provisions in AB 32 contemplated the adoption of "market-based compliance mechanisms." [1] The Legislature anticipated the possibility of linking with programs in other jurisdictions, finding that "national and international actions are necessary to fully address the issue of global warming," and directing ARB to consult with other states and nations "to facilitate the development of integrated and cost-effective regional, national, and international greenhouse gas reduction programs." [2]

The essence of a Cap-and-Trade program is that regulated entities must each surrender a compliance instrument (emission allowance or offset credit) for each ton of the entity's CO_2

[1] Health & Saf. Code §38505, subd. (k) [definition], §38561 subd. (b) [scoping plan], §38570 [authority to adopt market-based regulations].
[2] Health & Saf. Code §§38501, subd. (d), 38564.

equivalent emissions. The emission allowances are initially sold or distributed by the regulatory agency; each year the agency reduces the number of allowances available – the cap – until the desired level of emissions has been reached. The ability of regulated entities to buy and sell allowances among themselves, or to purchase offset credits issued for real, permanent, additional, verified and enforceable emission reductions from "offset projects," harnesses market efficiencies to facilitate the most cost-effective emission reductions. By reducing the number of allowances available over time, the desired emission reductions are also achieved reliably.

Linking two such programs means that compliance instruments (i.e., emission allowances and offset credits) issued by two jurisdictions can be used interchangeably for compliance in either jurisdiction.[3] Linking programs expands the market, enhancing the flexibility such programs provide. Linking also allows for centralizing administrative functions, thereby improving efficiencies and offering the potential to reduce governmental costs. The success of any linkage depends on the responsible regulatory agencies employing equivalent rigor designing and implementing their respective programs, including requiring accurate emissions reporting and maintaining effective controls on the issuance of compliance instruments. As discussed below, California and Québec have instituted equally rigorous programs.

Québec's Program

In 2009, Québec amended its Environmental Quality Act to provide for a Cap-and-Trade system.[4] In December 2011, Québec adopted implementing regulations very similar in structure to California's.[5] In December 2012, Québec finalized its implementing regulations to harmonize its program with California's program, and to allow the linking of the Québec and California programs.[6] The December regulations also included the operating rules of Québec's offset system. Recently, Québec's Ministère du Développement durable, de l'Environnement, de la Faune et des Parcs (Ministry for Sustainable Development, Environment, Wildlife and Parks) provided a summary of their program to the Air Resources Board.

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[3] Gov. Code §12894, subd. (e).

[4] Government of Québec (2009) Bill 42- An Act to amend the Environment Quality Act and other legislative provisions to climate change. June 2009. Québec National Assembly Bill, codified at R.S.Q., c. Q-2, r. 46.1 http://canlii.org/en/qc/laws/stat/rsq-c-q-2/latest/rsq-c-q-2.html.

[5] Regulation respecting a cap-and-trade system for greenhouse gas emission allowances, R.R.Q., c. Q-2, r. 46.1 ("Québec Trading Regulation") The initial Québec Trading Regulation is at http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=3&file=/Q_2/Q2R46_1_A.HTM

[6] The Regulation amending the Regulation pertaining to the Cap-and-trade system for greenhouse gas emission allowances was enacted by Decree No. 1184-2012 and published in the Québec Official Gazette, Part 2, number 51 on December 19th 2012, page 5480 (page 3485 of the English version), available at: http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=1&file=2012A%2F2392.PDF.

For the reasons discussed below, linkage with Québec satisfies the four findings required by Government Code section 12894. The remainder of this discussion is organized according to those four findings.

A. "Equivalent to or stricter than"

The first finding required by Government Code section 12894 subd. (f) focuses on the strength of the proposed linking partner's program:

> (1) The jurisdiction with which the state agency proposes to link has adopted program requirements for greenhouse gas reductions, including, but not limited to, requirements for offsets, that are equivalent to or stricter than those required by Division 25.5 (commencing with Section 38500) of the Health and Safety Code.

The potential equivalence of California's and Québec's climate programs can be examined in terms of each jurisdiction's emission reduction goal, the role of the Cap-and-Trade program in achieving each jurisdiction's reduction goal, and the rules and requirements incorporated into each jurisdiction's Cap-and-Trade program regulations.

Emission Reduction Goals. Both California and Québec define their respective emission reduction goal relative to their 1990 emissions. California's goal, defined in AB 32, is to reduce emissions to 1990 levels by 2020. Québec's goal, defined in Decree 1187-2009 made on November, 18, 2009, is to reduce emissions to 20% below 1990 levels. Both the California and Québec goals have the force of law. In this respect, the overall Québec climate program goal is numerically stricter than the California goal.

In 1990, California greenhouse gas emissions were 427 million metric tons of CO_2 equivalent ($MMTCO_2e$),[7] or about 14.2 metric tons per capita. In 1990 the Québec emissions were 83.9 $MMTCO_2e$,[8] or about 12.1 metric tons per capita.

Both California and Québec have substantial transportation and industrial related emissions. However, one important difference between California and Québec is that the Québec electricity system is virtually emission free because hydropower accounts for nearly all power generation in the province. Consequently, whereas California can achieve some emission reductions by switching to lower-emitting or non-emitting power generation, Québec must be especially strict to achieve its reductions almost entirely from the transport and industrial sectors.

Based on these considerations, overall the Québec emissions reduction goal is equivalent to or stricter than California's goal.

[7] See *California 1990 Greenhouse Gas Emissions Level and 2020 Emissions Limit*, California Air Resources Board, November 16, 2007, at: http://www.arb.ca.gov/cc/inventory/pubs/reports/staff_report_1990_level.pdf.

[8] See: *Québec Inventory of Greenhouse Gas Emissions in 2009 and Their Changes Since 1990*, Atmospheric Quality Policy Directorate, Sustainable Development Environment and Parks, November 2011

Role of the Cap-and-Trade Program. Both California and Québec have designed their respective Cap-and-Trade programs to support the attainment of their emission reduction goals. Both jurisdictions designed their programs so that the emissions permissible under the Cap-and-Trade program plus the emissions that are not covered by the program sum to their respective 2020 emissions goals. The total amount of emission allowances in each program from 2013 to 2020 was also developed using the same method, which incorporates expected emissions that will be covered by the program in the first compliance period (with a narrow program scope) and the second and third compliance periods (with a broad program scope). That method for defining the emissions permissible under a Cap-and-Trade program was recommended by the Western Climate Initiative Partner jurisdictions, including both California and Québec.[9]

In this respect, the Cap-and-Trade programs in California and Québec have equivalent roles in each jurisdiction's overall emissions reduction program. However, because the Québec emission reduction goal is numerically more stringent than the California goal, the Québec Cap-and-Trade program emission reduction requirements are more stringent than the California requirements.

Cap-and-Trade Program Rules and Requirements. Due to extensive collaboration as California and Québec participated in the Western Climate Initiative (WCI), the two Cap-and-Trade programs share many identical features. Simultaneous with California's regulatory development, ARB staff collaborated with other states and Canadian provinces to develop and refine general program design documents intended for use by WCI Partner jurisdictions that choose to institute Cap-and-Trade programs. The resulting "Design Recommendations for the WCI Regional Cap-and-Trade Program," (2010) incorporates the principal elements ultimately adopted in the California and Québec regulations. Both jurisdictions are committed to a continuing collaboration to ensure that both programs maintain their equivalence.

Similarly, California's reporting regulation – an integral part of an effective Cap-and-Trade program – formed the basis for WCI's "Essential Requirements for Mandatory Reporting" in 2009, amended and published by WCI in 2010, as the "Final Harmonization of Essential Reporting Requirements in Canadian Jurisdictions" (Essential Requirements). Québec adopted a reporting program closely patterned on that WCI document, customized for its particular industrial sector makeup.

The California and Québec program regulations include identical features to ensure the efficacy of the emissions cap and to facilitate fair and equitable access to an efficient market for compliance instruments. ARB and Québec staff conducted line-by-line comparisons of the respective program regulations to harmonize them in every respect needed to ensure the environmental integrity and compatibility of the programs. The regulatory amendments adopted by ARB in June 2012, finalized by Québec in December 2012, and proposed by ARB to accomplish program linking, provide for fully harmonized

[9] See: *Guidance for Developing WCI Partner Allowance Budget*, Western Climate Initiative, 2010, at: http://www.westernclimateinitiative.org/document-archives/Cap-Setting--and--Allowance-Distribution-Committee-Documents/Guidance-for-Developing-WCI-Partner-Allowance-Budgets/.

program requirements. The following are several highlights of the program requirements, with references to the corresponding portions of the California and Québec regulations.

- *Verified emissions reporting*. Both California's and Québec's reporting regulations are consistent with WCI's Essential Requirements document. Both programs require reporting at a 10,000 MTCO2e threshold and more rigorous reporting above a 25,000 MTCO2e level, which is the threshold at which entities become subject to the Cap-and-Trade program under both California's and Québec's regulations.[10]

Both programs similarly define the boundaries for reporting entities as facilities at a common location and affiliated with the same company.[11] However, different terms are employed -- "facility" (California) and "establishment" (Québec) – to remain consistent with usage in the respective laws of the two jurisdictions. Québec and California both require the same instrument calibration to ensure accuracy.[12] Most Québec reporting entities maintain ISO certification, which provides an additional incentive to maintain accurate devices so as to preserve their certification. California and Québec reporting regulations require a ±5% accuracy standard for all instruments.

Both programs prescribe methods for estimating data that is missing, for example due to a malfunctioning meter. Both programs require that the substituted data are conservatively chosen based on operating conditions in the periods immediately before and after the missing time period, albeit using slightly different strategies.[13] California uses a more graduated approach that varies depending on how much data is missing. Both approaches are consistent with U.S. EPA's reporting requirements and the WCI's recommended methods.

Once an entity prepares its annual emissions report, both jurisdictions require the report to be verified by an accredited third-party verifier to ensure data quality. Both verification programs are based on International Organization for Standards (ISO) standards and are consistent with WCI's Essential Requirements.

Both Québec's and California's program apply to the same seven greenhouse gases.[14] Québec's Cap-and-Trade program is broader than California's by including all of the gases included in AB 32 in both its reporting and Cap-and-Trade regulations, including hydrofluorocarbons from cooling units, SF_6 and perfluorocarbons from the electricity sector, process and fugitive emissions from magnesium production, and high global warming potential (high-GWP) gas emissions from electronic manufacturing. California opted to regulate those high-GWP gases in separate direct regulations, outside of the

[10] See Monitoring and Reporting Regulation, 17 CCR §95100 et seq., and Québec's "Regulation respecting mandatory reporting of certain emissions of contaminants into the atmosphere" c. Q-2, r.15 (Québec Reporting Regulation), available at http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=3&file=/Q_2/Q2R15_A.htm.
[11] Québec Reporting Regulation, c. Q-2, r.15, §3 (9); 17 CCR §95102 subd. (a)(144).
[12] Québec Reporting Regulation, c.Q-2, r.15, *passim*, e.g. Schedule A.2, QC 1.5.2; 17 CCR §95103, subd. (k).
[13] Québec Reporting Regulation, c. Q-2, r.15, schedule A.2 QC.1.6, QC.23.5; 17 CCR §§95112-95129.
[14] Québec Trading Regulation, R.R.Q., c. Q-2, r. 46.1, §§2, 3 (10); 17 CCR §95810.

Cap-and-Trade program. These regulations are the SF_6 Emissions Reductions from Gas Insulated Switchgear Regulation (2010), the regulation regarding Small Containers of Automotive Refrigerant (2009), and the Regulation for Management of High Global Warming Potential Refrigerants for Stationary Sources (2009). As such, both California and Québec require the reporting and reduction of emissions from these sources, even though the regulatory programs employ different strategies. Québec's Cap-and-Trade program is stricter insofar as it reaches sources that no California regulation yet reaches, such as natural gas transmission pipelines.

- *Government control over emissions allowances*. Both California and Québec tightly control the number of emissions allowances issued each year, resulting in a declining cap.[15] Each instrument is given a unique serial number, and is tracked in a system common to both jurisdictions. California and Québec both distribute allowances through free allocation and auctions.[16] Both programs encompass roughly 85% of total greenhouse gas emissions, including emissions from about 600 California facilities, and from 110 Québec facilities.

- *Compliance Instrument Surrender*. Based on the verified emissions, California and Québec entities will need to surrender a corresponding number of compliance instruments.[17] Failure to surrender on schedule will result in a three-to-one obligation for each un-surrendered compliance instrument in both programs.[18]

- *Allowance Reserve to Contain Prices*. Both programs incorporate a reserve of emission allowances that will be made available at quarterly reserve sales at set prices.[19] California and Quebec fill their respective reserves from within their program allowance caps, each using about 4.9 percent of the total emission allowances in the program. The respective reserve sales will be available only to covered entities from the jurisdiction conducting the sales. To qualify to purchase allowances from the reserve in Québec, a covered entity must have no allowances in its general holding account. This requirement targets the Québec reserve allowances to covered entities unable to otherwise obtain allowances. California's program does not include this requirement, making allowances from the California reserve more accessible to California's covered entities. The Québec program allowance reserve sales are therefore stricter.

- *Anti-fraud provisions*. Both Québec and California require the buyer and seller to take affirmative steps to confirm transfers of compliance instruments, to foil unauthorized transactions by hackers.[20] Both programs also have provisions

[15] Québec Trading Regulation §6; 17 CCR §95820.
[16] Québec ECA, R.S.Q., c. Q-2, §46.8; Québec Trading Regulation §§39-44; 17 CCR §95840 et seq.
[17] Québec ECA, R.S.Q., c. Q-2, §46.6; Québec Trading Regulation §§19-21; 17 CCR §§95850, 95856.
[18] Québec Trading Regulation §22; 17 CCR §95857.
[19] Québec Trading Regulation §45; 17 CCR §§95910-95914.
[20] Québec Trading Regulation §§25, 26 (see June 8, 2012 amendments); 17 CCR §95921.

forbidding providing false information to, or withholding material information from, any party in connection with a transaction.[21]

- *Holding limitations.* Both programs incorporate the same limitations on the number of compliance instruments one entity or affiliated group can hold, to prevent any party from accumulating holdings that would enable the exercise of market power.[22]

- *Limited offsets subject to detailed protocols.* The offset programs are equivalent. California and Québec will both limit the use of offset credits to eight percent of an entity's compliance obligation*.*[23] The offsets themselves must be approved by the respective governments, provided standards are met ensuring that the emission reductions are real, quantifiable, permanent, enforceable, additional, and verifiable, as required by AB 32.[24] As with allowances, offsets issued by each jurisdiction are fully fungible and once issued, recognized as a valid compliance instrument for a linked market program. A California and Québec entity may use a combination of California or Québec issued offsets up to the offset limit of eight percent to meet its compliance obligation. As with other aspects of a trading program, WCI partners including Québec developed and released recommendations regarding the offset program, the "WCI Offset System Essential Elements Final Recommendations Paper" in 2010 (Offset Elements). Most importantly, the AB 32 requirements for offsets (real, additional, permanent, enforceable, verifiable, and quantifiable) were incorporated into the WCI Offset Elements Paper and are consistent with California's definition of these criteria. These requirements were incorporated in Québec's program regulations, adopted in December 2012, so that the Québec offsets are equivalent to California offsets.

To qualify as an offset under Québec's program, emission reductions must be additional, permanent, and accurately and conservatively quantified. To maintain quality, offsets must fall within a limited number of approved protocols. Québec protocols, like California's, are defined so that offset projects address sources that neither jurisdiction regulates. Québec protocols are limited to livestock waste digesters, small landfill gas recovery, and ODS destruction. Québec limits approved projects to those in Canada. That requirement is parallel to California's regulation, with California's currently approved protocols extending only within the United States.[25] In developing the linkage amendments to the Cap-and-Trade Regulation, ARB did a thorough analysis of the three protocols currently adopted by Quebec. That analysis can be found in the *Initial Statement of Reasons* noticed on May 9, 2012.
http://www.arb.ca.gov/regact/2012/capandtrade12/isormainfinal.pdf

That report contains a summary of Québec's draft offset provisions and three protocols. Based on the final documents, the Québec offset program and protocols meet the AB 32 offset requirements. California and Québec will collaborate on the development of any

[21] Québec Trading Regulation §§28-31; 17 CCR §95921 subd. (e).
[22] Québec Trading Regulation §32; 17 CCR §95920.
[23] Québec Trading Regulation §20; 17 CCR §95854.
[24] Québec Trading Regulation §§70.1 et seq (see June 8, 2012 amendments); 17 CCR §95970.
[25] Québec Trading Regulation §§70.3 and Appendix D (see June 8, 2012 amendments); 17 CCR §95972.

additional protocols, to ensure that all future offset protocols also meet the requirements of AB 32.

Québec requires annual reporting, documentation, and verification of emission reductions from offset projects, as does California. The verification body must be free of conflicts of interest.[26]

In the event an offset is later invalidated, Québec has recourse to the offset developer. If the offset developer is unable to replace the invalidated offsets, Québec will withdraw replacements offsets from a buffer account. This buffer account is filled by requiring that each offset project place 3% of its issued offsets into the account.[27] The buffer account is managed by Québec. California employs a different strategy regarding invalidated offsets. If an offset is invalidated, the offset itself is removed from the program. If the offset had been used for compliance, the party that surrendered the offset credits is required to obtain and surrender replacements. Under both programs, the stringency of the cap is preserved through the replacement of any invalidated offsets, resulting in equivalent outcomes.

Overall, the harmonization of the program regulations results in equivalency in the two programs' environmental integrity, compliance requirements, and market rules.

B. Continued enforceability of AB 32.

The second finding required by Government Code section 12894 subd. (f) addresses California's continued ability to enforce AB 32:

> (2) Under the proposed linkage, the State of California is able to enforce Division 25.5 (commencing with Section 38500) of the Health and Safety Code and related statutes, against any entity subject to regulation under those statutes, and against any entity located within the linking jurisdiction to the maximum extent permitted under the United States and California Constitutions.

California will retain the ability to enforce against persons subject to California regulations to the maximum constitutional extent. Those who participate in California's program, including those who participate solely to purchase and sell compliance instruments, are subject to California's jurisdiction under established interpretations of due process.[28] Moreover, the regulation itself provides that "Any party that participates in the Cap-and-Trade Program is subject to the jurisdiction of the State of California," expressly including persons who purchase or hold compliance instruments.[29] Finally, participation in the program requires registration in either Québec or California. For those registering in

[26] Québec Trading Regulation (see June 8, 2012 amendments) §§70.12, 70.13 [annual report], 70.15 [report verification], 70.14 [conflicts of interest]; 17 CCR §§95976 [annual report], 95977 [report verification], 95979 [conflicts of interest].
[27] Québec Trading Regulation §70.20 (see June 8, 2012 amendments); compare 17 CCR §95985.
[28] *See International Shoe Co., Inc. v. Washington* (1945) 326 U.S. 310 [requiring minimum contacts such that exercise of jurisdiction does not offend traditional notions of fair play and substantial justice].
[29] 17 CCR §§96010, 96022.

California, registrants expressly submit to California's jurisdiction.[30] Registration also requires the participant to provide an address and designated representative in California to facilitate prompt service of process.[31] Any bidder in California's auction must pre-qualify by registering and tendering a guarantee such as a bond or letter of credit.[32]

We note that persons who register and participate in Québec's trading program will submit to Québec's jurisdiction, and will provide equivalent information allowing Québec to take legal action if necessary. To the extent such parties are beyond California's jurisdiction due to constitutional limitations, the finding is satisfied, because by its terms, the finding requires enforcement only where constitutionally possible. California and Québec will continue to coordinate and to share information so as to assist one another in enforcement efforts. Similarly, both jurisdictions have established relationships with the Commodity Futures Trading Commission, which has jurisdiction over certain derivative instruments, trading of which could affect the market for compliance instruments.

C. Enforceability of the linked program.

The third finding required by Government Code section 12894 subd. (f) focuses on the other jurisdiction's enforcement powers:

> (3) The proposed linkage provides for enforcement of applicable laws by the state agency or by the linking jurisdiction of program requirements that are equivalent to or stricter than those required by Division 25.5 (commencing with Section 38500) of the Health and Safety Code.

Québec's program is fully enforceable. Québec's Ministère du Développement durable, de l'Environnement, de la Faune et des Parcs [Ministry of Sustainable Development, Environment, Wildlife and Parks] has legal authority to enforce its regulations. This authority stems in part from Québec's Environment Quality Act (QEQA 2012)[33], which incorporates various provisions of Québec's Code of Penal Procedure (QCPP 2009)[34]. Pursuant to Québec law, daily penalties may be assessed for violations of its regulations (QEQA 2012, §§115.13-115.28). Similar to California's program, certain actions, including criminal actions, would be referred to the provincial or State Attorney General or other prosecutor. Additional criminal statutes which may be applicable in the context of GHG reporting and Cap-and-Trade would be Canada's Competition Act (Canada Competition Act 1985)[35] (section 52 applies to fraud) and Canada's Criminal Code (Canada Criminal

[30] 17 CCR §95832 subd. (d).
[31] 17 CCR §95830 subd. (c)(6).
[32] 17 CCR §95912 subd. (c), (h).
[33] Québec Environment Quality Act, R.S.Q., c Q-2. http://canlii.org/en/qc/laws/stat/rsq-c-q-2/latest/rsq-c-q-2.html.
[34] Québec Code of Penal Procedure, R.S.Q., c. C-25.1, 2009.http://canlii.org/en/qc/laws/stat/rsq-c-c-25.1/latest/rsq-c-c-25.1.html.
[35] Canada Competition Act (1985) Competition Act, R.S.C., 1985, c. C-34. http://laws-lois.justice.gc.ca/PDF/C-34.pdf

Code 1985). In addition, Québec's regulations specify the ranges of per-offense penalties, which may be compounded on a per-day basis pursuant to statute.[36]

Ultimately Québec's regulation allows for penalties higher than California law. The penalty scheme in Québec's regulation is more tailored than California's, differentiating between different parts of the regulation, and distinguishing violators who are natural persons from corporations. For example, under Québec's regulation, a natural person's failure to maintain certain records exposes the violator to a penalty of $3,000 to $100,000; a corporation would face a penalty between $10,000 and $600,000.[37] Québec's regulation sets higher penalties for other violations, such as exceeding the holding limit or failing to surrender free allowances, which can result in penalties of $6,000 - $250,000 (natural person) or $25,000 - $1,500,000 (corporation).[38] Even higher penalties can apply to deceptive trading of $10,000 - $500,000 (natural person) or $40,000 - $3,000,000 (corporation).[39] As under California's regulation, failure to surrender allowances under Québec's regulation can result in a separate penalty (higher in Québec) for each un-surrendered allowance.[40]

Those maximum amounts are higher than California's, which is $75,000 for intentional violations and less if based on negligence (maximum $25,000) or strict liability (maximum $10,000).[41] California has no minimum penalty, thus Québec minimum penalties are also higher. Consistent with California's approach to enforcement, the Ministry would commence an action based on the type of offense, taking into account its specific factors.[42]

Beyond the civil and criminal sanctions referred to above, by statute Québec's Minister of Sustainable Development, Environment, Wild Life and Parks can suspend an entity's operating authority (QECA §115.5 et seq.), seek an injunction (Québec Code of Penal Procedure §§751 -- 761), and by statute and regulation may suspend a party's trading account, suspend credit allocation or cancel credits, and deny registration for auction.[43] Those remedies are superior to powers ARB's Executive Officer has over California registrants under California's Cap-and-Trade regulation.[44]

The Québec Regulation, like California's, includes practical provisions to facilitate enforcement, including gathering information from the natural persons required to register to participate in Québec's trading program.[45] Such persons cannot have convictions for

[36] Québec ECA, R.S.Q., c. Q-2, §115.22, §115.37.
[37] Québec Trading Regulation §74.
[38] Québec Trading Regulation §75.
[39] Québec Trading Regulation §75.3.
[40] Québec Trading Regulation §75.4.
[41] Health & Saf. Code §42402 et seq.
[42] Québec ECA, R.S.Q., c. Q-2, §115.13, 115.41; Health & Saf. Code §42403.
[43] Québec Trading Regulation §§22, 43, 47, 60; Québec ECA, R.S.Q. c.Q-2, §46.12.
[44] Health & Saf. Code §§38580, 41513; 17 CCR §§96010 et seq.
[45] Québec Trading Regulation, sections 7 – 11.

certain crimes in the past five years.[46] Documents must be maintained for seven years.[47] Bidders in the Québec auction must provide a bid guarantee.[48]

D. *Linkage does not impose liability on California.*

The fourth finding required by Government Code section 12894 subd. (f) stipulates that:

> (4) The proposed linkage and any related participation of the State of California in Western Climate Initiative, Incorporated, shall not impose any significant liability on the state or any state agency for any failure associated with the linkage.

The statute's preceding subdivision (e) defines "linkage" as "an action taken by the State Air Resource Board or any other state agency that will result in" California accepting "compliance instruments issued by any other governmental agency . . .".

The proposed action to be taken by ARB is adopting the Linkage Regulation.[49] Careful review of the proposed regulation's terms and its intended operation does not reveal any provision that on its face imposes any significant liability, or indeed any liability, on California or any state agency. With regard to adopting the linkage regulation, we note that the state is not liable for "adopting or failing to adopt an enactment or by failing to enforce any law," or for actions related to the emissions market such as suspending or revoking privileges.[50]

We next consider whether California's "related participation" in Western Climate Initiative, Incorporated (WCI, Inc.) imposes any significant liability. The WCI Partner jurisdictions formed WCI, Inc. in 2011 as a non-profit corporation to provide administrative and technical support to state and provincial greenhouse gas emissions trading programs. California's "participation" in WCI, Inc. provides ARB access to administrative support that WCI, Inc. is developing, including:

(a) developing, implementing, and maintaining a system for tracking compliance instruments for allowance trading programs;

(b) developing, implementing, and maintaining capability to execute allowance auction and reserve sales; and

(c) developing, implementing, and maintaining capability to conduct analysis in support of each jurisdiction's market monitoring.

The benefits of participating in WCI, Inc. will include reduced administrative costs through cost sharing with other jurisdictions and enhanced security and effectiveness of program infrastructure across programs, including the tracking system, auction operation, and

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[46] Québec Trading Regulation §13.
[47] Québec Trading Regulation §4.
[48] Québec Trading Regulation §48.
[49] See proposed 17 CCR §95942 et seq ("Subarticle 12: Linkage to External Greenhouse Gas Emissions Trading Systems") at http://www.arb.ca.gov/regact/2012/capandtrade12/appendixa2.pdf.
[50] Govt. Code §§818.2, 818.4.

market monitoring. Additionally, California's EPA Secretary and ARB Board Chair sit on WCI, Inc.'s Board of Directors. California also has two non-voting directors, named by the Speaker of the Assembly and the Senate Rules Committee.

Participation in WCI, Inc. does not create new liabilities for California.   In fact, moving certain activities from the State of California to WCI, Inc. may create a barrier to liability sought to be imposed onto California. To the extent participation in WCI, Inc. includes the appointment of directors, we note that governing corporate law and WCI, Inc.'s corporate articles provide extensive protection for directors. WCI, Inc. has purchased insurance covering its directors. The law allows corporations to indemnify directors, officers, employees and agents for any good faith actions taken on the corporation's behalf.[51] WCI, Inc.'s articles of incorporation, sections 12 and 13, exonerate directors "to the fullest extent permitted" by law, and to indemnify directors and employees[52].

Conclusion

Comparing the details of California's and Québec's emissions trading programs supports the four findings. Because of the collaborative manner in which both programs were developed, they are designed to operate with equal rigor. Staff recommends that the Governor make the findings.

[51] Delaware Code Title 8, section 145. See also Del. Code Ann. tit. 8, §102(b)(7) [corporate articles can eliminate director liability for breaching a duty of care, unless in bad faith].
[52] WCI, Inc. Statement of Incorporation 4 (2011).